TANG KA WAK v. PP

HIGH COURT MALAYA, IPOH
ANSELM CHARLES FERNANDIS JC
[CRIMINAL APPEAL NO: AA-42S-2-03-2017]
28 DECEMBER 2017

CRIMINAL PROCEDURE: *Appeal – Appeal against sentence – Accused sentenced to nine years imprisonment for causing grievous hurt under s. 326 of Penal Code – Whether sentence imposed by Sessions Court excessive – Whether judge failed to consider accused's age as mitigating factor – Whether advanced age of accused a 'factor that warrants special attention'*

Both the appellant and the victim ('SP2') were fishermen. According to the appellant, SP2 had, despite several demands, refused to pay the appellant the sum of RM6,000 for damaging his fishing net. After several verbal exchanges at a coffee shop, the appellant went back to his house nearby to fetch a parang which he claimed was merely to frighten SP2. SP2 suffered injuries that resulted in him being unable to have normal function of his hand which affected his livelihood as he was unable to fish. The appellant was accordingly charged under s. 326 of the Penal Code. In mitigation, the appellant submitted that he (i) was 71 years of age; (ii) had cooperated in the investigation; (iii) not a habitual offender; and (iv) had no previous criminal record. The appellant was sentenced to nine years imprisonment. Hence, the appellant appealed against his sentence.

Held (allowing appeal; reducing sentence to four years imprisonment):

(1) The Sessions Judge in this case 'is required to call for evidence or information regarding the background, antecedent and character of the accused'. This was especially so as the advanced age of the appellant had been put forth as a mitigating factor. Also, advanced age of the appellant is a 'factor that warrants special attention'. The advanced age of the accused could be a mitigating factor as an imprisonment sentence would impact an elderly accused taking into consideration the remaining lifespan of the accused and/or elderly persons often suffer from associated health issues. (paras 24, 25 & 28).

(2) A more lenient term of imprisonment was justified in the circumstances. Nine years imprisonment was excessive. The appellant, at the age of 71, his bilateral knee and hip osteoarthritis that he suffered from seemed to be debilitating. He was fully dependent on painkillers and had been staying at the prison clinic ward. The appellant also suffered from severe depression. The court had to strike a balance, as far as possible, between the interests of the public and the interests of the accused. (para 36).

Case(s) referred to:
Er Boon Huai & Anor v. PP [1991] 1 LNS 24 CA ***(refd)***
Gulyas v. State of Southern [2007] WASCA 263 ***(refd)***
Lim Guan Eng v. PP & Other Appeals [1998] 3 CLJ 769 CA ***(refd)***
Mohamed Jusoh Abdullah & Anor v. PP [1947] 1 LNS 73 ***(refd)***
Mohammad Hasnizam Hussein v. PP [2015] 1 LNS 433 CA ***(refd)***
PP v. Jafa Daud [1981] 1 LNS 28 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP v. Ma'arif [1969] 1 LNS 134 HC ***(refd)***
PP v. Mailaganum Nadeson [2009] 1 LNS 1610 HC ***(refd)***
PP lwn. Murad Halimuddin Hassan & Yang Lain Dan Satu Lagi Kes [2016] 1 LNS 554 HC ***(refd)***
PP v. Sulaiman Ahmad [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447 HC ***(refd)***
PP v. Yahaya Selaman [2006] 2 MLJ 475 ***(refd)***
R v. Clarke [2017] All ER (D) 67 (Apr) ***(refd)***
R v. Kenneth John Ball (1951) 35 Cr App R 164 ***(refd)***
R v. M [1996] SCJ No. 28 ***(refd)***
Raja Izzuddin Shah v. PP [1978] 1 LNS 165 HC ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 172D(3), 289
Penal Code, ss. 326, 354

For the appellant - Manjeet Kaur Kehar Singh; M/s Manjeet Kaur & Co
For the prosecution - Wan Azimah Wan Yaacob; DPP

Reported by Sandra Gabriel

JUDGMENT

Anselm Charles Fernandis JC:

Introduction

[1] This is an appeal by the learned Deputy Public Prosecutor against my decision in allowing the appellant's appeal against sentence. The appellant (the accused in the court below) was charged with voluntarily causing grievous hurt under s. 326 of the Penal Code against the complainant, Tew Eng Hwa (SP2) with a *parang*. In allowing the appellant's appeal, his sentence was reduced from nine years to four years imprisonment. The appellant's appeal against conviction was dismissed earlier on.

[2] At the trial, the prosecution had called a total of seven witnesses. The appellant was the only witness for the defence. At the end of the defence case, the appellant was found guilty and sentenced to nine years imprisonment. The maximum imprisonment for a s. 326 offence is 20 years imprisonment and shall also be liable to fine or whipping.

Background Facts

[3] Both the appellant and SP2 were fishermen. According to the appellant, SP2 had, despite several demands, refused to pay the appellant the sum of RM6,000 for damaging his fishing net. On 24 August 2012, the appellant saw SP2 at a coffee shop. There were some verbal exchanges between them. After that, the appellant went back to his house nearby to fetch a parang which he claimed he wanted to use merely to frighten SP2.

[4] SP2 on the other hand vehemently denies that he had damaged the appellant's net. He does not know why he was attacked by the appellant. He however admits that he and the appellant were involved in a verbal altercation or "gaduh mulut" before the appellant left the coffee shop and returned with the parang.

[5] According to SP7, Dr Jessica Ann Nathan who was on duty at the Seri Manjung Hospital at the material time, she observed the following injuries on the complainant:

> Pada saya, pesakit itu cedera di bahagian kepala iaitu luka sebesar 10cm di bahagian kepala hingga telinga kanan, tangan kanan jari ketiga dekat hujung jari hampir terputus, tulang di bawah tisu jarinya boleh nampak, tangan kiri ada luka di belakang tangan kiri yang dalam yang menunjukkan tulang di bawah tisu.

[6] SP2 was also referred to SP6, Vasan a/l Sinnadurai the specialist consultant orthopedic at the Pantai Hospital. He gave further details regarding the injuries sustained by SP2 and also gave a prognosis concerning the injuries. He stated the following in evidence:

> Pada masa pemeriksaan pesakit mengalami tangan kiri yang hampir putus iaitu dari jari hingga tapak tangan. Tendonnya semua terpotong. Dia mengalami fracture ditangannya. Walaupun tendonnya dibaiki, akan terdapat kaku berpanjangan. Tetapi dengan physiotherapy,ia mungkin akan berfungsi 50-60% sahaja.

[7] The complainant himself described his current situation regarding his injuries as follows:

> Tangan kiri saya sekarang boleh gerak sikit-sikit dan ia tidak boleh menggenggam apa-apa. Saya tida boleh tulis.Saya tidak boleh genggam apa-apa pun. Sebelum kejadian,tangan kiri saya boleh menggenggam. Saya sudah mengalami kecacatan tangan dan tidak boleh kerja kuat sebagai seorang nelayan. Saya cacat di tangan kiri.

[8] In mitigation, counsel for the appellant submitted the appellant was 71 years of age. This case had commenced since 2013. Apart from that, the appellant had fully cooperated in the investigation. The appellant was not a habitual offender. He has no previous record. Finally, he was concerned that if a long imprisonment sentence was to be imposed, the appellant may not

be able to be with his family again. Learned counsel for the appellant submitted that if the appellant was to be released, his daughter would take care of him. The daughter was present in court throughout the proceedings.

[9] Essentially, the learned Deputy Public Prosecutor stated in reply that the appellant was not provoked. The offence was a serious one. SP2 had suffered permanent disability and this had affected his livelihood. There was also no proof that SP2 had damaged the appellant's net. The learned Deputy had also submitted that the appellant had taken a parang to injure SP2 and that he should be responsible for his actions.

Relevant Sentencing Principles

[10] The pertinent consideration in sentencing had been well set out by Hashim Yeop A Sani J (as His Lordship then was) in the often-quoted case of *Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256 as follows:

> In respect of sentencing there can be only general guidelines. No two cases can have exactly the same facts to the minutest detail. **Facts do differ from case to case and ultimately each case has to be decided on its own merits.** In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations. (emphasis added)

[11] This same proposition was stated in the case of *Mohamed Jusoh Abdullah & Anor v. PP* [1947] 1 LNS 73; [1947] 13 MLJ 130 where Wilan CJ stated:

> In our view no sentence can be assessed by a simple mathematical formula. **Many factors must be taken into account according to the circumstances of each individual case.** In that respect we would draw attention to the matters which should be taken into account in fixing punishments as set out in *Halsbury's Laws of England* (Hailsham Edition) volume 9, para 365:
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> > The Court, in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he has received, if the crime is one of violence, the antecedents of the prisoner up to the time of sentence, his age and character. (emphasis added)

[12] The principle stated in *Mohamed Jusoh bin Abdullah*'s case was met with approval in the recent Court of Appeal case of *PP lwn. Murad Halimuddin Hassan & Yang Lain Dan Satu Lagi Kes* [2016] 1 LNS 554.

[13] What can be discerned from the above authorities is that, in sentencing, there are no two cases which are alike. There is no simple mathematical formula for sentencing. This court is of the view that apart from taking into consideration the aggravating as well as the mitigating factors which will give reasons for the sentencing judge to either enhance or reduce a particular sentence, the court would also take into consideration other special circumstances peculiar to the case or accused so as to impose a sentence which is a "sentence according to law".

[14] What is a sentence in accordance with law is set out in the case of *PP v. Jafa Daud* [1981] 1 LNS 28; [1981] 1 MLJ 315 where Mohamed Azmi J (as His Lordship then was) explained the meaning of "sentence according to law". His Lordship said:

> A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles.
>
> In assessing sentence, one of the main factors to be considered is whether the convicted person is a first offender. It is for this purpose that before passing sentence, **a Magistrate is required to call for evidence or information regarding the background, antecedent and character of the accused.** (emphasis added)

[15] In this respect, it is incumbent that the sentencing court to call for relevant evidence or information and explain as to why it came to impose such a sentence so that the appellate court can assess the lawfulness and appropriateness of the sentence. Such approach was taken by the Court of Appeal in the case of *Lim Guan Eng v. PP & Other Appeals* [1998] 3 CLJ 769 where it was held, among other things that:

> Suffice to say that a court should, when sentencing an accused, take into account all considerations, relevant to the case, including the gravity of the offence, the circumstances surrounding the commission of the offence, the antecedents of the accused, the deterrent effect that punishment is to have, *any factor that warrants special attention either in favour or against the accused and above all the public interest. Reasons must be given for imposing a particular sentence to enable an appellate court to ensure that there has been no error in principle.* (emphasis added).

See also the oft-quoted case of *R v. Kenneth John Ball* (1951) 35 Cr. App. R 164.

[16] As a general rule however, the appellate court should not vary a sentence just because it would have passed a different sentence from that imposed unless it is manifestly excessive or manifestly inadequate or not in accordance with law. See *PP v. Sulaiman Ahmad* [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447; [1993] 1 MLJ 74.

[17] This court is also reminded of the fact that the appellant is over 50 years of age. At the time of sentencing, he was 71 years old. The sentence of caning hence cannot be imposed on him by virtue of s. 289 of the Criminal Procedure Code. The said section reads:

> No sentence of whipping shall be executed by instalments, and none of the following persons shall be punishable with whipping:
>
> (a) females;
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> (b) males sentenced to death;
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> (c) males whom the Court considers to be more than fifty years of age, except males sentenced to whipping under section 376, 377C, 377CA or 377E of the Penal Code.

[18] Consequent to this, the sentencing court cannot impose a heavier imprisonment sentence just because the accused escapes caning because of his age. Section 289 of the Criminal Procedure Code places the three categories of persons stated therein in a special position in that any provision in any law imposing a liability to caning would not be applicable to such persons. The maximum penalty that the appellant can be punished with under s. 326 is therefore imprisonment for a term which may extend to 20 years and shall also be liable to fine (without any caning). See *Er Boon Huai & Anor v. PP* [1991] 1 LNS 24; [1991] 3 MLJ 351, *PP v. Mailaganum Nadeson* [2009] 1 LNS 1610.

The Present Appeal

[19] At the onset, I am reminded of the principle that an appeal is a continuation of proceedings by way of a rehearing and the appellate court can review all the evidence to re-examination in order to determine whether the findings of the trial court are correct. See *PP v. Ma'arif* [1969] 1 LNS 134; and *Mohammad Hasnizam Hussein v. PP* [2015] 1 LNS 433 CA. I therefore proceed on this premise.

[20] As stated earlier, it was incumbent for the sentencing court to have called for all relevant information at the time of sentencing which should have included a medical report. During the proceedings on 13 October 2017, I had noticed that the appellant was in a feeble condition and had to be supported onto the dock. In such circumstances, I ordered a medical report to be prepared as none was done before this. This court also bore in mind the fact that the appellant was 71 years at that point of time.

[21] The medical report dated 20 October 2017 prepared by Dr Muhammad Afiq bin Mohd, Klinik Penjara Tapah, came to be considered on 30 October 2017. The medical report was solely to be used to determine the health status of the appellant for the purpose of sentencing and nothing more. The relevant portion of the said medical report states as follows:

a) The appellant has been imprisoned in Tapah prison since 6 March 2017.

b) Since 14 March 2017, the appellant has been staying in the clinic ward.

c) The appellant was diagnosed with bilateral knee and hip osteoarthritis. The pain has progressively worsened in the past 10 months whereby the appellant needs constant assistance for his mobility and in performing his daily activities. The appellant is also fully dependent on painkillers. He was given Paracetamol and Tramadol to relieve him of the pain. He also suffers from gastritis.

d) In a separate physiological assessment report, it is stated that the appellant's score showed that he was suffering from severe depression.

e) Apart from that stated above he suffers from mild mental disorder (gangguan mental yang sederhana) and needs further observation and evaluation.

[22] Back to the present proceedings, the learned Sessions Judge in his grounds had stated the following with regard to the sentencing of the appellant (at p. 22 jilid 1 of the record of appeal):

> Sebelum Mahkamah menjatuhkan hukuman,peguam bela bagi pihak OKT telah merayu suatu hukuman yang ringan memandangkan OKT sudah berumur 71 tahun dan kes ini telah dibicarakan sejak tahun 2013 di mana OKT telah memberi kerjasama yang penuh sepanjang hari hari perbicaraan. Kesalahan ini adalah kesalahan yang pertama OKT dan OKT bukanlah seorang penjenayah tegar.
>
> Pihak pendakwa dalam hujahan balasnya berhujah dengan memohon hukuman pemenjaraan yang sewajarnya kerana perbuatan OKT telah mengakibatkan kecacatan kekal kepada SP2. SP2 sebagai seorang nelayan tidak boleh berkerja sebagai normal lagi dan SP2 telah mengalami trauma sejak kejadian tersebut berlaku (Penyataan Impact Mangsa di bawah seksyen 183A di kemukakan di Mahkamah). Pihak pendakwaan berhujah lagi bahawa factor usia OKT tidak sepatutnya diberi pertimbangan oleh Mahkamah kerana OKT sepatutnya tahu dan sedar akibat dari perbuatannya itu.
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> The learned Sessions judge concluded by saying:
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> > Setelah mendengar rayuan dan hujahan daripada pihak pembelaan dan pihak pendakwaan tersebut, maka mahkamah membuat keputusan mendapati OKT bersalah dan disabitkan dengan kesalahan seperti dalam kertas pertuduhan. Oleh itu OKT dijatuhkan hukuman penjara selama 9 tahun dari Tarikh jatuh hukum.

[23] Regretfully from the reading of the above, I am unable to discern the reasoning of the learned Sessions Judge in imposing a sentence of nine years imprisonment upon the appellant. This was simply because the learned Sessions Judge did not give any reasons as to why he imposed the nine-year term of imprisonment. The learned Sessions Judge had done nothing more than repeat what counsel for the appellant and the Deputy Public Prosecutor had submitted.

[24] It is this court's considered view that the Sessions Judge in this case "is required to call for evidence or information regarding the background, antecedent and character of the accused". This is especially so as the advanced age of the appellant had been put forth as a mitigating factor. See case of *PP v. Jafa bin Daud supra.*

[25] This court is also of the view that the advanced age of the appellant is a "factor that warrants special attention" see case of *Lim Guan Eng v. Public Prosecutor, supra*.

[26] That being the case, I find that the learned Sessions Judge had failed to consider the age of the appellant as a mitigating factor. As to the importance of taking into consideration of mitigating circumstances, two cases come to mind namely *Raja Izzuddin Shah v. PP* [1978] 1 LNS 165; [1979] 1 MLJ 270, in which Hashim Yeop A Sani J (as His Lordship then was) had said:

> (1) there were matters pleaded in mitigation in this case and these should have been considered by the learned Magistrate in imposing sentence;
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> (2) no plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution;

and *Zaidon Shariff v. PP* [1996] 4 CLJ 441 Augustine Paul J (as His Lordship then was):

> A mitigation plea should not be treated as a ritualistic step by an accused following a conviction only to be rejected the moment it is uttered. It merits due consideration in the light of the facts of the case and, more so, when it is not contradicted by the prosecution.

[27] The failure of the learned Sessions Judge to state his reasons for meting out the sentence or evaluating the aggravating and mitigating factors would necessitate this court to look into the legality or propriety of the sentence imposed against the appellant as well.

Age And Health As A Mitigation Factor

[28] The learned Deputy Public Prosecutor argued that the age and health of the appellant should not be taken into consideration as the appellant should be responsible for his own actions. It is, however, my view that advanced age of an accused can be a mitigating factor for either or both of the following reasons:

(i) an imprisonment sentence would disproportionately impact an elderly accused considering the remaining lifespan of that accused. This court takes note of the fact that the life expectancy of the average Malaysian Chinese male is 75 years according to a document entitled *"Abridged Life Tables, Malaysia, 2015-2017"* by the Department of Statistics Malaysia and published in their official portal.

(ii) elderly accused persons often have associated health issues.

[29] In determining the appropriate sentence for an elderly accused, it is perhaps convenient here to refer to the decision of the Supreme Court of Canada in the case *R. v. M.* [1996] SCJ No. 28 [M. (C.A.) which provides some useful direction on this issue. This case concerned offences arising from a pattern of sexual, physical and emotional abuse inflicted upon the accused's children over a number of years. There, Lamer J discussed generally on the sentencing of elderly offenders. He stated*:*

> [I]n the process of determining a just and appropriate fixed term sentence of imprisonment, the sentencing judge should be mindful of the age of the offender in applying the relevant principles of sentencing. After a certain point, the utilitarian and normative goals of sentencing will eventually begin to exhaust themselves once a contemplated sentence starts to surpass any reasonable estimation of the offender's remaining natural lifespan. Accordingly, in exercising his or her specialised discretion under the Code, *a sentencing judge should generally refrain from imposing a fixed-term sentence which so greatly exceeds an offender's remaining lifespan that the traditional goals of sentencing, even general deterrence and denunciation, have all but depleted their functional value.* (emphasis added)

[30] In the present case, considering the age of the appellant as well as his health condition, a sentence of nine years would almost amount to a "natural life" sentence. It is this court's view that a jail sentence to a person of the appellant's age and condition is much more severe than it would be to a younger person and to a person in better health. Further, taking into consideration the appellant's age and health, the objectives of punishment such as reform and rehabilitation as well as deterrence from committing an offence of similar nature by the appellant are not factors that would feature highly as would a younger person.

[31] Closer to home, in the Court of Appeal (Western Australia) case of *Gulyas v. State of Southern* [2007] WASCA 263 the court, after discussing several cases concerning the effect of imprisonment on accused persons of advanced age, stated as follows:

A It seems to me that the following broad general principles might be extracted as being ordinarily applicable in a case such as the present:

(1) Where moral culpability is reduced by reason of advanced age (which will inevitably mean that the advanced age is coupled with some other factor that is a consequence of it, for example when there is an age-related mental impairment), allowance should be made for that factor.

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(2) Where there is evidence sufficient to justify the conclusion that circumstances associated with advanced age (for example, continuous ill health, or ill health coupled with physical or mental frailty) will make imprisonment more arduous for the offender than is normal, allowance should be made for this.

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(3) Account may also be taken of hardship for the offender arising out of his or her knowledge that a lengthy sentence of imprisonment is likely to destroy any reasonable expectation of useful life after release. However, the punishment must still reflect the crime and the seriousness of the offending behaviour may be such that the offender has forfeited the right to any reasonable expectation of useful life after release.

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(4) Deterrence and denunciation are important even in the case of an offender of advanced age. However, where there are factors associated with age that justify a more lenient sentence, the general public will understand why the sentence is less severe than might otherwise have been the case and the purposes of deterrence and denunciation will still be served. However, if this is to be achieved, the punishment must still reflect the seriousness of the crime.

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F **[32]** In the same vein, in the English case of *R v. Clarke; R v. Cooper* - [2017] All ER (D) 67 (Apr), the Court of Appeal stated:

> Whilst we consider that an offender's diminished life expectancy, his age, health and the prospect of dying in prison are factors legitimately to be taken into account in passing sentence, they have to be balanced against the gravity of the offending, (including the harm done to victims), and the public interest in setting appropriate punishment for very serious crimes.

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[33] From the above authorities, it can be gathered that advanced age and factors associated with it, most notably health issues, could be taken into consideration as mitigating factors in sentencing an accused. In considering these factors however, the seriousness of the offence must also be reflected in the sentence to be meted out. Accordingly, a balance has to be achieved between these two factors.

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[34] It is perhaps proper at this juncture to refer to the case of *Pendakwa Raya v. Yahaya Selaman* [2006] 2 MLJ 475 where it was stated there that:

> The magistrate had taken into account the age and the respondent's health in reducing the sentence. When committing the said offence, the respondent himself realised the state of his health but was still willing to commit the offence. Therefore, the respondent, by right, should experience the punishment meted out for the offence committed from the point of law. If old age and health reasons are accepted as an ingredient to lighten punishment, the court will give a wrong impression to the public that old and aged people are given special treatment if convicted. By right, old age will make one more matured as regards thinking and experience. (translated from Bahasa Melayu)

[35] This court is of the view that the proposition in *Yahaya Selaman* was not meant to be of general application. The facts of the case are vastly different from the present case. There, the accused was charged with s. 354 (assault or use of criminal force to a person with intent to outrage modesty) where the victim was his three-year-old granddaughter. The law, which mirrors public policy, has always looked upon sexually orientated crimes as very serious, especially where the victim is a child. This is seen by the fact that "any sexual offence" is out of the ambit of plea bargaining. So also is any offence committed against a child below 12 years of age. See s. 172D(3) of the Criminal Procedure Code [539].

Conclusion

[36] After considering the aspects of sentencing, I am of the view that a more lenient term of imprisonment is justified in the circumstances. At the age of 71, his bilateral knee and hip osteoarthritis he suffers now seem to be debilitating. He is fully dependent on painkillers. He had been staying in the ward at the prison clinic since 14 March 2016. He also suffers from severe depression. However, as highlighted by the learned Deputy Public Prosecutor, the court cannot ignore the fact that the appellant had committed a serious offence and the injuries that had been inflicted upon SP2 may cause some permanent disability to him. This court has to strike a balance, as far as possible, between the interests of the public and the interests of the accused see *(PP v. Loo Choon Fatt supra).* In doing so, I find the sentence of nine years imprisonment manifestly excessive and replace it with one of four years as an appropriate punitive period of imprisonment having regard to all the relevant circumstances. Sentence to run from the date of sentencing at the lower court. This appeal is allowed to that extent.